IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

FRIDAY, THE 1ST DECEMBER 2006 / 10TH AGRAHAYANA 1928

CRL.A.No. 2047 of 2004(D)

SC.43/2002 of ASSISTANT SESSIONS COURT, PARAVUR
CP.27/2000 of JUDL.MAGISTRATE OF FIRST CLASS, PERUMBAVOOR

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APPELLANT:

RAVI, S/O.IRAN,
C.NO.4060, CENTRAL PRISONS, VIYUR,
THRISSUR.

BY ADV. ADV.LATHA PRABHAKARAN(STATE BRIEF)

RESPONDENTS:

STATE OF KERALA.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 20-11-2006

THE COURT ON THE COURT ON 1-12-2006 DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. A. NO. 2047 of 2004

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Dated, this the 1st day of December, 2006

JUDGMENT

The appellant Ravi who was the sole accused in Sessions Case No. 43/02 on the file of the Principal Assistant Sessions Court, North Paravur for an offence punishable under Sec. 376 I.P.C. challenges the conviction entered and the sentence passed against him by the said court.

2. The case of the prosecution is that on 29-9-1997 at about 11. 30 p.m. in house No. VIII/531 of Sreemoolanagaram Panchayath, the accused who was 52 years at that time committed rape on his own elder daughter Salini aged 13 years after forcibly removing her skirt and underwear.

3. On the accused pleading not guilty to the charge framed against him by the court below, the prosecution was permitted to adduce evidence in support of its case. The prosecution examined 10 witnesses as P.Ws 1 to 10 and got marked 9 documents as Exts. P1 to P9 and 4 material objects as MOs 1 to 4.

4. After the close of the prosecution evidence, the accused

was questioned under SEc. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He stated that it was his wife who was not on cordial terms with him who had instigated his daughter to falsely implicate him in this case.

5. The court below did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C.. The accused was, therefore, called upon to enter on his defence and to adduce any evidence which he might have in support thereof. He examined his wife Alli as D.W.1 and got marked Ext.D1 letter.

6. The learned Assistant Sessions Judge, after trial, as per judgment dated 25-6-2004 found the appellant guilty of the offence and sentenced him to undergo simple imprisonment for 7 years and to pay a fine of Rs. 25,000/- and on default of payment of fine to undergo simple imprisonment for six months. Out of the fine amount as and when realised, a sum of Rs. 24,000/- was directed to be given to the victim as compensation under Se c. 357 (1) Cr.P..C. It is the said judgment which is assailed in this appeal preferred from the Central Prison, Thrissur.

7. The only point which arises for consideration in this appeal

is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:

8. I heard Adv. Smt. Latha Prabhakaran, who defended the accused on State Brief and Adv. Sri. K.S. Sivakumar, the learned Public Prosecutor, who defended the State.

9. P.W.1 (K.D. Mary) is a retired teacher of St. Joseph's High School, Kanhoor. During the period 1996-1997 she was the physical education teacher of the said school and she knew P.W.3 Salini as a student of 8th standard of that school. P.W.2 (Dr. Jayasree) who was the Assistant Surgeon at the Community Health Center, Kalady examined P.W.3 (Salini) on 30-9-1997 at 6.15 p.m. and issued Ext.P1 certificate. P.W.3 (Salini) is the alleged victim. P.W.4 (Aneesha) who is the younger sister of Salini and who was studying in the 5th standard in the very same school was allegedly sleeping in the same room where P.W.3 was sleeping in the ill-fated night. P.W.5 (Lilly) was the headmistress of St. Joseph's Girls High School, Kanhoor. She proved Ext.P4 birth certificate pertaining to P.W.3. P.W.6 (Sarada) was the Village Officer, Chovvara who proved Ext.P5 scene plan. P.W.7 (Dr. C.K. Ravi) examined the accused and proved Ext.P6 potency certificate . PW8 (T.E. Pareed) was the headconstable of

Kalady police station. He recorded Ext.P3 F.I. statement of P.W.3 and registered Ext.P7 F.I.R. He then dispatched P.W.3 for medical examination. P.W.9 (Alex M. Varkey) was the Circle Inspector of Police, Angamaly, who conducted the investigation. On 1-10-1997 at 10.45 a.m. he proceeded to the scene of crime and prepared Ext.P8 scene mahazar. He, thereafter, seized M.O.3 shirt, M.O.2 skirt, M.O.4 petticoat and M.O.2 underwear belonging to P.W.3 as per Ext.P9 mahazar. He recorded the statements of witnesses. On 3-10-1997 at 8.30 a.m. he arrested the accused from Kanhoor junction. He then dispatched the accused with a requisition to the doctor for conducting potency test. He then sent forwarding note to the committal court for sending the dress for chemical examination. He then gave a requisition to the headmistress of the school for the age certificate of P.W.3.

10. Adv. Mrs. Latha Prabhakaran, the learned counsel appearing for the appellant on State Brief made the following submissions before me in support of her fervent plea for acquittal of the appellant:-

11. An incestuous carnal intercourse by a person who is none other than the father of the victim, if true, is one of the most despicable form of sexual perversion which deserves the most

condign punishment. But it is a fundamental principle of criminal justice that before visiting a person with punishment for an offence, it is for the prosecution to prove the offence beyond reasonable doubt. P.W.2 the doctor who examined P.W.3 on 30-09-21997 and issued Ext.P1 certificate has opined that there was no evidence of any recent sexual intercourse and that hymen was absent in the girl. The specific charge against the accused is that he had incestuous sexual intercourse with Salini, his daughter at 11.30 p.m. on 29-9-1997. If the doctor could not find any evidence of recent sexual intercourse, it falsifies the specific charge of the prosecution. Accused is not called upon to answer a charge that he had been committing rape on his daughter on previous occasions . Hence, evidence if any, given by P.W.3 the alleged victim about the previous acts of sexual intercourse is of no avail to the prosecution. P.W.1 , the doctor states in Ext.P1 certificate that the vaginal swab of the girl was taken. That is why in Ext.P1 certificate she has opined that definite opinion ca be given only after seeing the chemical examination report. But no report has been produced with regard to the vaginal swab. While according to P.W.3, she as well as her younger sister were sleeping on the floor in the very same room in which the accused was sleeping on the cot, her sister P.W.4 would say that their father was sleeping in

another room. According to P.W.3 she did not cry or scream after the occurrence. But going by the testimony of P.W.4 she was aroused in her sleep by hearing the wailing of P.W.3. With regard to Ext.P6 potency certificate proved by P.W.7 the doctor also there is nothing to suggest that P.W.7 had seen the genital organ of the accused in an erect state. He had only seen it in a flaccid state.

12. I am afraid that I cannot agree with the above submissions. P.W.3 the victim has credibly stated before court about the incestuous sexual intercourse committed by the accused who is none other than her own father. Her evidence is amply corroborated by the testimonies of P.Ws 4 and 1 respectively who are the younger sister and physical education teacher to whom PW.3 had narrated her traumatic experience during the previous night. The mere fact that no injury was found on the private parts of P.W.3 does not lead to the conclusion that there was no forced sexual intercourse. **See Ranjit Hazarika v. State of Assam - 1998 (8) SCC 635.** Similarly medical opinion of the doctor that there was no evidence of recent sexual intercourse is o also not conclusive. **See State of H.P. v. Manjooran - 2000 (7) SCC 224**. The medical evidence showed that hymen of the girl was absent. Failure to detect spermatozoa or semen on the dress is also inconclusive since usually live spermatozoa will

remain alive only up to 72 hours. It must be remembered that P.W.3 was far below the age of consent and, therefore, even if she had fully co-operated with the accused in the sexual act, that does not in any way mitigate the gravity of the offence. The trial judge who had the unique advantage of seeing the witnesses and assessing their credibility has chosen to believe P.W.3 the victim. Her evidence gains corroboration in the form of res gestae evidence through her sister P.W.4 and her own physical education teacher P.W.1. The conviction was rightly entered against the appellant. The sentence imposed on the appellant also cannot be said to be the harsh or disproportionately excessive having regard to the seriousness of the offence and the prohibited degree at which the accused and P.W.3 stands each other. I do not find any good ground to interfere with the sentence as well.

In the result, this Appeal is dismissed, confirming the conviction entered and the sentence passed against the appellant.

V. RAMKUMAR,
(JUDGE)

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V. RAMKUMAR, J.
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Crl. A. NO. 2047 of 2004
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December 1, 2006

JUDGMENT